BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LOREN ALBRIGHT	)	
Claimant	)	
VS.	)	
	)	Docket No. 152,410
KANSAS VAN AND STORAGE	)	
Respondent	)	
AND	)	
	)	
FARMERS INSURANCE EXCHANGE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the July 26, 2012 Award by Administrative Law Judge (ALJ) Brad E. Avery.

APPEARANCES

Jan L. Fisher, of Topeka, Kansas, appeared for the claimant. Clifford K. Stubbs, of Kansas City, Kansas, appeared for respondent and its insurance carrier. Due to the recent retirement of Board Member David Shufelt, Jeffrey King, of Salina, Kansas has been appointed as Board Member Pro Tem in this case.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge ordered respondent to provide the claimant with the BiOM prosthetic device as he found it will more completely cure and relieve claimant of the effects of his injury by restoring more of the natural functions of his own foot and ankle.

The respondent requests review of this decision arguing that the Endolite Elan that they are willing to provide to claimant and which is covered by Medicare, is just as good as the BiOM that claimant wants and is what the ALJ ordered. Respondent argues that

the Endolite Elan is available at a lower cost and is a reasonable treatment to cure or relieve the claimant of his current problems. Respondent contends that the Award should be reversed.

Claimant argues that the Award should be affirmed. Claimant also brought up an issue of post award attorney fees, not addressed by the ALJ.

FINDINGS OF FACT

Claimant is 54 years old and currently works as a para-professional educator for U.S.D. 501 and Durham School Services. Claimant works at William Magnet school in the math department and drives two bus routes in the morning and one in the afternoon for Durham.

The purpose of the hearing was for claimant to request a new prosthetic limb. Claimant's need for a prosthetic arose from the loss of his right leg below the knee due to an accident in December 1988 and from complications from the surgery after the accident. Claimant testified that he has recently lost weight and as a result he has encountered an inability to get his current prosthetic to fit right. Claimant testified that his fluctuating weight affects his ability to use his prosthetic. Claimant testified that in the last 23 years, he has gone through eight to ten prosthetics. The average life of a prosthetic is three to five years.

As a result of his ill fitting prosthetic, claimant is experiencing pain at the bottom of his stump, in his hips and in his back. Claimant testified that with the prosthetic he has now, which is identified as a Flex Foot, he can only walk a block to a block and a half. This poses a problem for him since he has diabetes and needs to exercise regularly. The lack of physical activity has changed the severity of his diabetes, and he now requires two pills and one injection daily. Claimant testified that even before he lost weight he had issues with the fit of his prosthetic which limits his ability to walk far without getting tired. His current prosthetic doesn't allow him to handle stairs very well.

The Flex Foot prosthetic is made of carbon fiber and has multiple pieces: the socket with shaft bolts to the socket and metal shaft; the foot component bolts on the metal shaft; and the foot part that arches down and then back up to another piece that bolts on to the foot. The final parts are the wedges and the heel section. Claimant testified that he has to use his thigh, hip and knee to walk when using the Flex Foot prosthetic. Claimant testified that it requires more energy to walk on his right side and to be able to push down and off of his prosthetic in order to step.

For his prosthetic needs claimant has been going to Kansas City Artificial Limb and has been dealing with Ken Kessler and Jim Kessler. Both are certified prosthetic experts. Anytime claimant has a problem with his prosthesis he goes to see the Kesslers. When claimant was there in February 2012 to get an adjustment, the Kessler's recommended

that he get a new prosthetic. He was shown the different types available, which included the BiOM I Walk prosthetic.

Claimant's understanding of the BiOM I Walk prosthetic is that it was designed by a double amputee to help with mobility, while using less energy. Claimant testified that the foot has an anchor movement that is more like natural walking on a real foot. Claimant was able to examine the BiOM prosthetic. And because the representative at Kansas City Artificial Limb had a spare BiOM, he allowed claimant to try it out for about two hours. This prosthetic is customized to each person with their weight, height and various other criteria taken into account and programmed into the foot. While wearing the BiOM, claimant was able to walk up and down ramps, climb a hill and move with little effort. Claimant believes that this particular prosthetic will enable him to be more active. This is significant as claimant is diabetic and needs to lose weight and get more exercise.

Claimant acknowledged that when he gets fit for the prosthetic that he is currently using, the Flex Foot, he spends half the day walking on it to get the fit right. Claimant gets tired just from that activity and it makes it difficult for him to drive home after the fitting. Claimant has had this Flex Foot style for about 12 years. He agrees that he can perform his para job and drive the buses with his current prosthetic, stating it is "functional".[1] However, for the past 5 years he has had ongoing hip and back problems which he attributes in part to his current prosthetic. His current prosthetic costs about $12,000.00. The BiOM, with everything included, costs about $58,000.00.

Kenneth Kessler, a certified prosthetist at Kansas City Artificial Limbs, Inc., has worked in the profession since 1975. The business is family owned and deals strictly with prosthetics.

Mr. Kessler testified that when a new amputee comes in to get a prosthetic it is usually 10 days post surgery and the first step is to start strengthening and conditioning. Then the patient is given a shrinker for four to six weeks to prepare the stump to be fitted for the weight being pressed into a prosthetic. Next, measurements are taken so that the stump can be fitted for casting and socket fabrication. If the client is in for a refit all that is needed is a new set of measurements.

Claimant has been a client of the Kesslers for ten plus years and he has been fitted for more than one below the knee prosthetic. Mr. Kessler testified that currently claimant is using a below the knee patella tendon-bearing prosthesis with super condylar suspension and an energy storing carbon graphite foot. This foot will store approximately 50 percent of the energy exerted into it. Mr. Kessler described how the weight put on the foot compresses the carbon fibers and, as it comes across the toes, unloads to help propel forward the step. This foot replaces the plantar flexion of the foot. Mr. Kessler testified

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[1] P. H. Trans. at 26.

that claimant's prosthesis is held on by fitting over the knee joint like a cup. The fit can also be regulated by the thickness of the padding sock that is worn over the stump.

Mr. Kessler testified that no matter what type of prosthetic leg a person has, they are going to have complaints of fatigue when walking up stairs or walking at an elevated level because they are going to use roughly 40 to 60 percent more energy depending on the size of the person.[2] This is because there is less motion involved with the prosthetic foot. When someone with a real leg walks up an incline they use the toe to push off. But someone with a prosthetic limb has no push off and it takes more effort to take a step. Mr. Kessler also stated that the BiOM foot is heavier than the Flex Foot and is used by active duty veterans.

The last time Mr. Kessler met with claimant he was told that claimant had been diagnosed as diabetic and he knew claimant was going to be losing weight and would need adjustments. He also knew that claimant would have to be careful not to develop a blister from a wrong fit, because that would be bad for him as a diabetic.

When claimant received his prescription for a new prosthesis, he was asked if he wanted to come to Kansas City Artificial Limb and try the new most advanced foot in the world. Claimant came in when the sales rep was fitting a veteran out of Leavenworth with the BiOM and he let claimant try the BiOM.

Mr. Kessler testified that there is no comparison between the Flex Foot that claimant has and the BiOM foot that he was testing. The BiOM foot is motorized, does plantar flexion for the patient and will load up and push off as a motor assist. The foot is run by battery charged sensors. He testified that there is more adjustability in the BiOM foot than the Flex Foot.[3] Depending on the amount of walking done throughout a day, the battery would need to be changed during the day, but three rechargeable batteries come with the BiOM. At most, two batteries would be used in a day. As far as maintenance for each foot, the Flex Foot can break and require repair, and would most likely be the same as any other foot that requires maintenance.

Mr. Kessler acknowledged that currently the BiOM foot is not covered by Medicare. It is still being evaluated by Medicare for certification purposes. By Medicare standards, claimant is a K-3 level which means he can ambulate on his own up an incline, down steps, up steps and on uneven terrain. Claimant has not officially been evaluated to determine if the BiOM foot would work for him. The majority of Mr. Kessler's clientele are medicare eligible, at least 65 years old or have been disabled for two years.

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[2] Kessler Depo. (June 18, 2012) at 13.

[3] Kessler Depo. (June 18, 2012) at 19-20.

Mr. Kessler has no record indicating that claimant's current prosthetic no longer works for him. He testified that it is not an issue of the prosthetic working for claimant, because any foot would work for him. A wheelchair or crutches would work for him.[4] A concern would be if claimant were to develop muscle cramping from overuse. He agreed that if claimant were to get a foot that uses less energy he would be less fatigued.

It would appear that claimant has no complaints about his current prosthetic. This is more a matter of claimant trying out a different prosthetic that is an upgrade from what he has. Claimant liked it and thinks it would benefit him and he would like to get one. Right now Mr. Kessler has only one client using the BiOM because it is so new. He testified that the foot that claimant is using now is the best on the market in its class. Only two prosthetics are between the Flex Foot and the BiOM. They are the Proprio and the Echelon, both of these are Medicare approved. Mr. Kessler is not certified to sell the Echelon yet, but he is for the Proprio and BiOM.

Tyrone Monroe, an employee of Hanger Prosthetics, has worked for the company for six years, and is working towards becoming a certified orthotist. He has worked with a number of below the knee amputees over the years and placed them in various types of prosthetics. Each prosthesis is custom made for each individual.

Mr. Monroe testified that insurance categorizes feet and their functionality by what they are used for. For example a SACH foot is considered a rubber foot with plastic keel for smoother rollover. This foot has been used for a long time because it is simple and is characterized as like walking in sand. The next type of foot is a single axis foot which allows for dorsiflexion and plantarflexion. The next type of foot is the multi axial foot, which is a combination of a flexible keel foot or a flex walk level foot. This foot allows for a little bit of dorsiflexion and plantarflexion and also inversion and eversion of a foot. The flex walk type foot with carbon fiber springs provides perceived ankle motion through weight bearing and cushion upon heel strike and energy return off the toe. There is also a shank foot system with vertical loading and shock absorption. The last two are a multi axial ankle with swing and a microprocessor controlled ankle with dorsiflexion, plantarflexion control and would be characterized with a flex walk type of foot system.

Mr. Monroe testified that there are three different activity levels and needs among amputees. They are K-1 level, which is limited transfer, such as from chair to bed or bed to chair; K-2 level, which is a fixed cadence on level surfaces; K-3 level, which includes community ambulators, people getting into the public using their prosthetics as their primary mode of getting around to do everyday things; and finally K-4 level, which includes those who have the ability to exceed basic levels of ambulation and can participate in more high impact activity such as basketball, running or jogging on a regular basis.

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[4] Kessler Depo. (June 18, 2012) at 43-44.

The majority of Mr. Monroe's K-3 clients are in the flex walk category of feet, but as technology changes and improves, he is placing more clients into the multi axials with swing phase.

Mr. Monroe testified that it is essential to know the patient's underlying medical issues when paring them with what devices would be appropriate for them. This is because if someone had cognitive issues it can rule out certain types of prosthetics. Skeletal muscle issues are also considered when determining the appropriate prosthetic because the weight of the components might outweigh the benefits to the patient.

Mr. Monroe evaluated the claimant and found that claimant was having socket discomfort with this artificial limb. He examined all of the parts of the limb and took what he found into consideration for determining the appropriate prosthetic for claimant. Mr. Monroe found that, based on claimant's activity, terrain and the things he would like to get back to, claimant would benefit from an articulated ankle with the flex walk spring design. He felt that the articulated ankle flex walk would provide claimant with greater security, comfort and balance on uneven terrain, slopes, steps and stairs. He recommended an elevated suspension to mitigate claimant's weight, and which would also provide cushioning and energy return to help for an efficient gait.[5] He also felt that the socket should be made of carbon fiber, titanium or other materials allowing total contact against the limb to obtained better circulation and support for the limb. As for the liner, Mr. Monroe recommended the elevated vav because it allows for a better seal. He testified that there were a few models that fit into the category he put claimant in.

Mr. Monroe testified that the Endolite Elan foot with all of the recommended components falls within the category that he recommends for claimant. He felt that it would provide several benefits that would address the challenges claimant faces.

The parties stipulated into evidence an April 24, 2012, response report from interrogatories submitted to board certified orthopedic surgeon John H. Gilbert, M.D., of Orthopedic and Sports Medicine. Dr. Gilbert's responses indicated that he was unaware of any functional limitations being currently experienced by claimant with his current prosthesis. He was unable to identify either of the recommended prosthetic models or the number of patients currently utilizing those models. He was unable to identify any specific activities that claimant could perform with the bionic foot that he could not do with his current foot. He had no information regarding the training required to use the bionic foot, could not speculate on its effect on claimant's ability to drive or perform work functions, had no information regarding the power requirements of the recommended prosthesis nor information regarding the care requirements or reparability for the bionic foot.

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[5] Monroe Depo. (July 6, 2012) at 19-20.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 1987 Supp. 44-510(a) states:

> It shall be the duty of the employer to provide the services of a physician, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, as may be reasonably necessary to cure and relieve the employee from the effects of the injury. In every case, all fees, transportation costs, and charges under this section and all costs and charges for medical records and testimony shall be subject to approval by the director and shall be limited to such as are fair, reasonable and necessary. The director shall have jurisdiction to hear and determine all disputes as to such charges and interest due thereon.

It is respondent's obligation to provide medical care, including prosthetic devices as may be "reasonably necessary to cure and relieve the employee from the effects of the injury". Here, claimant requests an upgrade of his prosthetic from a "Flex Foot" model costing around $12,000.00 to the BiOM costing over $57,000.00. Two prosthetic experts have testified to the benefits of their various models of prosthetic. Mr. Kessler recommends the BiOM because he is certified in that model and sells it. Mr. Monroe recommends the Endolite Elan for the same reason. Neither prosthetic is recommended by nor opposed by Dr. Gilbert. He appears to be uninformed on both models.

The Board notes that claimant has been a client of Mr. Kessler for years and has briefly tried the BiOM. However, the BiOM is not covered by Medicare and the Endolite Elan is.

The Board must determine what is "reasonably necessary" and what is not. What is reasonable does not necessarily mean what is the very best or the very latest technology. Here, respondent has offered the Endolite Elan, a prosthetic similar to the BiOM. Both would apparently exceed the benefit of claimant's current prosthetic. The Board finds that respondent's offer to provide the Endolite Elan satisfies the statutory requirement of "reasonably necessary to cure and relieve" in this instance. The Award is modified and respondent is ordered to provide claimant with the Endolite Elan, as offered.

Claimant in a letter dated August 17, 2012, raised the issue of post-Award attorney's fees. It was noted that the ALJ did not address the issue. It was just being preserved for the ALJ's future determination. Under K.S.A. 44-555c, the Board is limited to considering only questions of law and fact presented to and determined by the ALJ. As no Post-Award attorney fee determination has been made, the Board will not address this issue at this time.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to order respondent to provide the Endolite Elan prosthetic for claimant.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated July 26, 2012, is modified to order respondent to provide the Endolite Elan per respondent's offer.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge